



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 394 OF 2018

JOSEPH GACHIGUA KAMAU.....PETITIONER

-VERSUS-

COUNCIL OF LEGAL EDUCATIONRESPONDENT

JUDGMENT

1. The Petitioner, Joseph Gachigua Kamau, holds a Bachelor of Laws (LL.B.) degree awarded to him on 15th February, 2013 by Uganda Pentecostal University. The Respondent, Council of Legal Education, is a creature of Section 5 of the Legal Education Act, 2012. Its functions are stated in Section 8 of the Act as follows:-

“8. Functions of the Council

(1) The functions of the Council shall be to—

- (a) regulate legal education and training in Kenya offered by legal education providers;**
- (b) licence legal education providers;**
- (c) supervise legal education providers; and**
- (d) advise the Government on matters relating to legal education and training.**
- (e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.**
- (f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.**

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

- (a) accreditation of legal education providers for the purposes of licensing;**
- (b) curricula and mode of instruction;**
- (c) mode and quality of examinations;**
- (d) harmonization of legal education programmes; and**
- (e) monitoring and evaluation of legal education providers and programmes.**

(3) In carrying out its functions under subsection (2), the Council shall—

- (a) make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;
- (b) establish criteria for the recognition and equation of academic qualifications in legal education;
- (c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;
- (d) establish a system of equivalencies of legal educational qualifications and credit transfers;
- (e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;
- (f) collect, analyse and publish information relating to legal education and training;
- (g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;
- (h) carry out regular visits and inspections of legal education providers; and
- (i) perform and exercise any other functions conferred on it by this Act.

(4) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.”

2. Through his petition dated 10th October, 2018 the Petitioner alleges that the Respondent’s decision conveyed to him through the letter dated 19th September, 2018 violates his constitutional rights and fundamental freedoms as expressed by Articles 27, 28, 29, 35, 43(1)(f) and 47(1) of the Constitution.

3. The letter sated 19th September, 2018 addressed to the Petitioner by the Respondent stated that:-

“RECOGNITION AND APPROVAL OF FOREIGN QUALIFICATIONS: LL.B. UGANDA PENTECOSTAL UNIVERSITY

Reference is made to your application for registration for the November 2018 Bar examination series received by Council on 10th September 2018.

Your attention is drawn to Council letters Ref: CLE/RA/03 Vol. VII/(62) and CLE/RA/05 Vol. IV(12) dated 15th February and 10th November 2016 respectively. In these letters, Council advised that you undertake remedial programme in Commercial Law. You were further required to furnish documentary evidence that Uganda Pentecostal University was accredited to offer the Diploma in Law Programme.

Council has not received evidence that you attended remedial programme or that Uganda Pentecostal University was accredited to offer Diploma in Law.

Kindly furnish Council with the requisite documentation to facilitate expeditious and conclusive determination of your application.

Council wishes you well in your endeavors.”

4. The Respondent’s opposition to the petition is found in the statement of grounds of opposition and skeletal submissions dated 15th July, 2019. In summary the Respondent’s defence is: that its decision implemented the substance of Section 23 as read together with the Second Schedule to the Legal Education Act, 2012 and Regulation 7 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 as required by Section 8(1)(e) and (f) of the Legal Education Act, 2012; that the Petitioner has not established unfair discrimination hence has failed to prove violation of Article 27 of the Constitution; and that legitimate expectation cannot exist against or override the clear provisions of statute and the law.

5. The Petitioner holds a Bachelor of Laws degree from Uganda Pentecostal University. He also has a Diploma in Law from the same University. He has a Master of Laws degree from the University of Nairobi. He has also sat and passed pre-bar examination administered by Kenya School of Law. These are facts documented in the exhibits placed before Court by the Petitioner. The Respondent did not rebut these facts or made any attempt to do so.

6. The Petitioner’s case is that the Legal Education Act, 2012 and the Kenya School of Law Act, 2012 are not applicable to him having enrolled for his LL.B. studies before the two Acts of Parliament were passed. Not even a blank bullet was fired back by the Respondent in response to this particular assertion. On my part, I agree with the Petitioner’s counsel that the Acts could not indeed apply retrospectively to him—see the decision of Odunga, J in **Kevin K. Mwiti & others Kenya School of Law & 2 others [2015] eKLR** and my decision in **Ngugi**

7. In the circumstances, and as correctly submitted by counsel for the Petitioner, the applicable law is found in the repealed Council of Legal Education Act, Cap.16A which at Regulation 5 found in Part II of the First Schedule to the Council of Legal Education (Kenya School of Law) Regulations, 2009 provided that:-

“5. A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has–

(a) passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university;

(b) passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling a that university, university college or other institution–

(i) attained a minimum entry requirements for admission to a university in Kenya; and

(ii) a minimum grade B (plain) in English Language and a mean grade of C (plus) in the Kenya Certificate of Secondary Examination or its equivalent;

(c) a Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. “A” levels, “IB”, relevant “Diploma”, other “undergraduate degree” or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or

(d) a Bachelor of Laws Degree (LL.B) from recognized university and attained a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a precondition for admission.”

8. The Petitioner admitted that he indeed did not qualify to pursue a Bachelor of Laws degree pursuant to Regulation 5(b). Even though he had obtained a Diploma in Law and was indeed allowed by Regulation 5(c) to join Kenya School of Law, he submitted to the Respondent’s overzealous enforcement of the law and went ahead to comply with Regulation 5(d) by sitting and passing pre-bar examination. The Petitioner was therefore qualified by virtue of Regulation 5(d) to join the Kenya School of Law.

9. The Respondent did not point out any legal provision that made commercial law a core unit in the pre-2012 legal regime set-up. The Respondent also failed to specifically respond to the Petitioner’s averment at paragraphs 27 and 28 of his affidavit sworn on 15th October, 2018 in support of the petition that:-

“27. Further I had undertaken the core units in commercial law that were incorporated in 1st year under Law of Contract II, 2nd year under Law of Sales, in 3rd year under Business Association Law I & II, Banking and Negotiable Instruments and in 4th year on Patent Law. (Annexed hereto is a copy of the Uganda Pentecostal University’s Curriculum marked “JGK 17”).

28. That I aver that the advise by the Council of Legal Education to undertake a remedial programme in commercial law is discriminative since it has been clearing applicants for the past years including 2018 to apply and join the school based on the same curriculum and reading list I used to apply.”

10. In view of my finding that the Respondent did not establish that commercial law was a core unit at the time the Petitioner commenced his studies coupled with the Petitioner’s averment that he covered commercial law in other study units, I conclude that the Respondent’s demand that the Petitioner undertakes remedial studies in commercial law was without any basis.

11. Considering what has been stated so far in this judgment it becomes clear that there was no valid reason for the Respondent to deny the Petitioner an opportunity to sit for the bar examination. The petition is therefore one destined for success.

12. In the petition, the Petitioner seeks orders as follows:-

a. That there be a declaration that the petitioner’s fundamental rights and freedom as enshrined under Article 27 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

b. That there be a declaration that the petitioner’s fundamental rights and freedom as enshrined under Article 28 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

c. That there be a declaration that the petitioner’s fundamental rights and freedom as enshrined under Article 29 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

d. That there be a declaration that the petitioner’s fundamental rights and freedom as enshrined under Article 43(1)(f) of the

Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

e. That there be a declaration that the petitioner's fundamental rights and freedom as enshrined under Article 47(1) of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

f. That there be a declaration that the petitioner's fundamental rights and freedom as enshrined under Article 35 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

f. An order compelling the respondent to register the petitioner for the Bar examination for academic year 2018/2019.

g. General damages for the breach of the petitioner's constitutional rights.

h. Any other relief that the court may deem fit and just.

i. Costs of the petition.

13. The question is whether the Petitioner proved all or any of the violations he alleges. Has the Petitioner proved violation of Article 27 by the Respondent? The formula to be used in determining whether Article 27 has been violated was set in the South Africa case of **Mbona v Shepstone and Wylie [2015] ZACC 11**, quoted with approval by Mwita, J in **Council of Governors v Salaries & Remuneration Commission [2018] eKLR**, as follows:-

“[26] The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair... Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair”

14. As correctly submitted by the Respondent, the Petitioner alleged discrimination without more. He did not place any evidence before the court to establish that he had indeed been treated differently. His claim that the Respondent violated Article 27 of the Constitution therefore fails.

15. Article 28 establishes the right to human dignity whereas Article 29 guarantees freedom and security of the person. The Petitioner not only failed to state in what manner these rights were violated by the Respondent but he also failed to provide evidence to support the alleged violations.

16. The Petitioner also failed to state how the right provided by Article 35 of the Constitution to access information was violated. He also did not furnish any evidence in support of the alleged violations.

17. The Petitioner provided correspondences between him and the Respondent. The Respondent clearly explained in the exchanges why the Petitioner was denied an opportunity to sit the bar examination. In such circumstances, the Petitioner cannot be heard to say that the Respondent breached the right to fair administrative action found in Article 47(1) of the Constitution.

18. As already demonstrated in this judgment, the Respondent had no legal basis for denying the Petitioner the right to sit the bar examination. Such denial, without more, clearly violated the Petitioner's right to education as protected by Article 43(1)(f) of the Constitution. The Petitioner had done all that needed to be done in order to be allowed to pursue training at the Kenya School of law as an advocate. I therefore find that the Respondent breached the Petitioner's right to education.

19. In **Republic v Principal Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO [2019] eKLR**, Mativo, J defined the term “procedural legitimate expectation” as follows:-

“17. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims the court follows a twostep approach. Firstly, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists the administrator is required to act in accordance with that expectation, except if there are public interest considerations which outweighs the individual's expectation.”

20. In **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others [2014] eKLR**, the Supreme Court held that:-

“For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation.”

21. The Court went ahead and distilled the principles of the doctrine of legitimate expectation as follows:-

“[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”

22. One of the grounds upon which the Petitioner hinged his petition is that the Respondent violated his legitimate expectation that he would sit the bar examination upon fulfilling the statutory requirements. Every person who studies law and desires to train as an advocate, has a legitimate expectation that he/she will join the Kenya School of Law once he/she has met the statutory requirements. The expectation is legitimate because it is founded on the law. When such a person, is for no identifiable reason, denied an opportunity to train as an advocate, it is said that the person's legitimate expectation has been breached. This is what happened to the Petitioner. As such, I agree with the Petitioner that the Respondent breached his legitimate expectation of training as an advocate since he had complied with the statutory requirements.

23. Counsel proposed an award of Kshs5,000,000 on each violation. The decision in the case of **Dr. Samson Gwer & 5 others v Kenya Medical Research Institute (KEMRI) & 3 others [2014] eKLR** was cited in support of the proposition. I do not find the cited case a good indicator in the circumstances of this case.

24. In the case before me, the Petitioner went ahead and sat the bar examination as a result of a consent recorded in this matter by the advocates for the parties on 13th November, 2018. On 1st July, 2019 counsel for the Respondent indicated to the court that the results of the bar examination, which had been withheld, had been released to the Petitioner. One can therefore say that no financial harm was occasioned to the Petitioner. There was no time wasted by the Petitioner as he continued with his studies while this matter was proceeding in court. It is important to remember that the Respondent is funded by public funds and any award made against it is a raid on the taxpayers' pockets.

25. That is not to say that general damages, should not be awarded against public entities. Where the violation has not resulted in any significant effect on the petitioner, a declaration that a right was violated can be sufficient remedy. Despite what I have stated, I find that the Petitioner should not leave this court empty-handed. In the circumstances I find the sum Kshs.100,000/- reasonable as general damages and I award the Petitioner the said amount.

26. In summary therefore I enter judgment in favour of the Petitioner as follows:-

- a. A declaration is hereby issued that the Respondent's actions violated the Petitioner's right to education contrary to Article 43(1)(f) of the Constitution;
- b. A declaration is hereby issued that the Respondent's actions violated the Petitioner's legitimate expectation to train as an advocate;
- c. The Petitioner is awarded Kshs.100,000/- as general damages for the violation of his rights by the Respondent. The said award shall attract interest at court rates from the date of judgment till payment in full; and
- d. The Petitioner shall have the costs of the proceedings from the Respondent.

Dated, signed and delivered at Nairobi this 19th day of December 2019.

W. Korir,

Judge of the High Court